

APPENDIX X
CLEAN AIR ACT CIVIL PENALTY POLICY FOR VIOLATIONS
OF 40 C.F.R. 82, SUBPART F: MAINTENANCE, SERVICE,
REPAIR, AND DISPOSAL OF APPLIANCES CONTAINING REFRIGERANT
June 1, 1994

INTRODUCTION

Purpose

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions.

Scope

This appendix is to be used pursuant to Sections 113(b) and (d) for violations of Section 608 of the Clean Air Act ("Act" or "CAA"), as amended, and 40 C.F.R. Part 82, Subpart F.

Usage

This appendix should be used in conjunction with the Stationary Source Civil Penalty Policy to determine a preliminary deterrence amount, which is the sum of the economic benefit accruing from noncompliance and the gravity component reflecting the seriousness of the violation.

This appendix is to be used for settlement purposes in civil judicial cases involving violations of Section 608, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases that do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. As the Stationary Source Civil Penalty Policy indicates, for administrative penalty cases under Section 113(d)(1), the Region should plead the penalty calculated under this policy, using the most aggressive assumptions supportable, in its complaint.

Person Liable

Any "person" as defined in the Act and in the Section 6084 regulations may be held liable for violations of Section 608. For example, all "persons" owning and/or operating a facility subject to the provisions of the Act, and any employees of such a facility, are legally responsible for complying with Section 608 and with 40 C.F.R. Part 82, Subpart F. For the purpose of seeking penalties for violations, EPA will often bring enforcement actions against the owners and/or operators of such facilities, rather than against individual employees. However, for the purpose of Section 608 violations, "person" includes the technician who services an appliance and the employee who sells refrigerant, as well as the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician or employee. Person also includes owners of appliances, disposal facilities, manufacturers and importers of recycling or recovery equipment, technician certification programs, reclaimers, and equipment testing organizations. Matters involving possible criminal behavior by individuals or organizations should be referred to the Regional Criminal Enforcement Counsel.

PENALTIES FOR VIOLATING THE ACT AND THE REGULATIONS

Section 113 of the Clean Air Act allows EPA to seek penalties of up to \$25,000 per day for each violation. EPA may in appropriate cases accept less than this statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect the statutory penalty assessment criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, duration of the violation as established by any credible evidence, the economic benefit of noncompliance, and the seriousness of the violation. The other penalty assessment factors in Section 113(e) should be taken into account in determining an appropriate penalty (the economic impact of the penalty on the business, good faith efforts to comply, and payment by the violator of penalties previously assessed for the same violation). However, reliable information on these factors is rarely available to EPA when a penalty is proposed. Accordingly, these factors will be considered if raised and properly documented during settlement. Respondents have the

burden of persuasion on these factors, which are in the nature of affirmative defenses.

CALCULATING A PENALTY

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for violations of Section 608 and the implementing regulations, ~ 40 C.F.R. Part 82, Subpart F, will be the sum of an economic benefit component and gravity component.

Economic Benefit

This component is a measure of the economic benefit gained by the violator as a result of noncompliance with the Act. The economic benefit gained by a person due to delayed or avoided costs will be determined in accordance with the Stationary Source Civil Penalty Policy using, as appropriate, the BEN computer model. Economic benefit should be calculated from the earliest provable date of violation until the date that the violation is corrected.

BEN is not appropriate in addressing the sales restriction imposed by the regulations. In this case, the economic benefit to the person who sells class I or II substances for use as a refrigerant is the profit on each sale. The profit will vary depending on how much the person paid to purchase the refrigerant and at what price the refrigerant is sold.

Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than \$5,000 (see p. 7 of the general policy), Regions should assess an economic benefit component for the entire matter in Section 608 enforcement actions unless it is less than \$500. Given that the economic benefit component in Section 608 enforcement actions will likely always be small (less than \$5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Since EPA policy requires the removal of the violator's economic benefit in every enforcement action, except for very limited circumstances, Regions should assess an economic benefit component in all Section 608 cases where it is greater than \$500.

Gravity

The gravity component, which is assessed in addition to economic benefit, is the measure of the seriousness of the violation. The gravity component should be determined by examining three factors: the potential environmental harm (ozone-depleting effect of the violators actions) resulting from the violations, the extent of deviation from the statutory or regulatory scheme, and the size of violator.

1. Potential Environmental Harm

The Section 608 regulations were promulgated to prevent harm to human health and the environment by preventing the release of substances that degrade the stratospheric ozone layer.

Noncompliance with the requirements of the regulations therefore, can result in harm to human health or the environment. Accordingly, the portion of the penalty calculation reflecting the potential environmental harm of the violation should be based on two factors:

- 1) the risk of or actual loss of refrigerant to the environment
- 2) the importance of compliance to the statutory or ; regulatory scheme

Risk of or actual loss

The risk of or actual loss presented by a given violation depends on both the likelihood of loss to the environment and the seriousness of the loss, which would include both the amount of refrigerant lost and its ozone depletion potential. A penalty should reflect the probability that the violation could have resulted in, or has resulted in, a loss of refrigerant to the environment. A larger penalty is appropriate for class I chemicals because of the greater ozone depletion potential than for class II chemicals. The greater the potential, the more ozone that may be destroyed in the stratosphere. In most cases, an actual loss would result in higher penalties than a potential loss.

One factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the risk of loss. The degree

of risk of loss represented by each category is defined as:

MAJOR:the violation poses or may pose a substantial risk of or actual loss of refrigerant to the environment

MODERATE:the violation poses or may pose a significant risk of or actual loss of refrigerant to the environment

MINOR:the violation poses or may pose a relatively low risk of or actual loss of refrigerant to the environment

In determining the degree of the risk of loss of refrigerant to the environment, Regions should consider how much refrigerant is normally in the system (e.g. 20,000 pounds or 2 pounds) and how likely was the activity in question to result in a release (e.g. changing a filter or changing the compressor).

For example, changing the compressor on a system containing 20,000 pounds of CFC-12 without having removed the refrigerant prior to repair would fall into the category of Substantial risk of or actual loss. Changing the filter on the same system without having removed the refrigerant prior to repair would fall into the category of Significant risk of or actual loss. Changing the filter on a system containing 2 pounds of HCFC-22 without having removed the refrigerant prior to repair would fall into the category, of Relatively Low risk of or actual loss. This assumes that filter changes can be accomplished quickly and with a smaller loss of refrigerant.

Importance of compliance to statutory or regulatory scheme

A second factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the importance of compliance to the statutory or regulatory scheme. The degree of importance of compliance to the statutory or regulatory scheme represented by each category is defined as:

MAJOR:the actions have or may have a substantial adverse effect on the statutory or regulatory scheme

MODERATE:the actions have or may have a significant adverse effect on the statutory or regulatory scheme

MINOR:the actions have or may have a small adverse effect on

the statutory or regulatory scheme

In determining the importance of compliance to the statutory or regulatory scheme, Regions should use the categorizations on the following list unless unusual circumstances suggest the these categories are inappropriate:

Major

1. Knowing Venting
2. Not using recycling/recovery equipment
3. Not repairing leaks (for equipment 50 lbs and over)
4. Accepting signed statement pursuant to §82.156(f)(2) if he person knew or had reason to know that such a signed statement is false
5. Failure to follow required practices in §82.156

Moderate

1. Technicians not properly trained and certified
2. Recovery Recycling equipment not properly maintained/does not pull specified vacuum
3. Not using equipment certified for the type of appliance
4. Manufacture or import of recycling or recovery equipment that is not certified
5. Altering design of certified refrigerant recycling or recovery equipment
6. Unapproved technician training or testing programs issuing certificates
7. Sale and distribution of refrigerants to persons who are not certified technicians after November 1994, unless for resale

Minor

1. Recordkeeping requirements not properly followed
2. Training certificate not available on request
3. Sale of unreclaimed refrigerant
4. Sale of refrigerant reclaimed by uncertified reclaimer
5. Release of more than 1.5% by reclaimer
6. Sale of equipment that does not have servicing aperture or process stub
7. Failure of owner or reclaimer to certify

If, in the Region's analysis, the two factors constituting potential for harm result in two different designations,

the more serious designation should be used. For example, the actions have or may have a substantial adverse effect on the statutory or regulatory scheme, but the violation poses or may pose a relatively low risk of loss of refrigerant to the environment. In this example, the potential for harm would be designated major.

2. Extent of Deviation

The extent of deviation from Section 608 and the implementing regulations relates to the degree to which the violation defeats the requirement violated. In any situation, a range of potential noncompliance with each requirement exists. In other words, a violator may be substantially in compliance with the provisions of a requirement or it may have totally disregarded a requirement. In determining the extent of deviation, the following categories should be used:

MAJOR:the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance. For example, the owner certification; is not submitted.

MODERATE:the violator significantly deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended. For example the owner certification is submitted six months late and includes only the name and address of the purchaser and the name and address of the establishment where each piece of equipment is located.

MINOR:the violator deviates somewhat from the regulation or statutory requirements but most, if not all important aspects of the requirements are met. For example, the owner certification is submitted one month late and does not include the number of service trucks used.

Each of the above factors, potential for harm and extent of deviation from a requirement, forms one of the axes of the penalty assessment matrix. The specific cell is chosen after determining which category (major, moderate, minor) is appropriate for the potential for harm factor and which category is appropriate for the extent of deviation factor. The complete matrix is:

Matrix 1:

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM

Major
Moderate
Minor

Major
\$15,000
\$12,000
\$10,000

Moderate
\$9,000
\$7,000
\$4,000

Minor
\$3,000
\$1,500
\$750

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g. notice of violation, warning letter, or administrative or judicial order), the amounts in Matrix 1 should be increased by a minimum of 30% for the first violation after an enforcement response and by a minimum of 50% for the first violation after the second to subsequent enforcement responses. These percentages may be increased at the Regions discretion.

Multiple Violations

EPA acknowledges that multiple violations of the same requirement by the same company of the Section 608 requirements may significantly increase the actual or potential environmental harm resulting from the violations. The Agency, therefore, will

assess additional amounts against a company for each repeated violation of the same requirement to ensure that the total penalty assessed appropriately reflects the seriousness of time defendant's violations after the base gravity component has been determined from Matrix 1 for the violation of a particular requirement, the multi incident component of the settlement penalty is calculated as follows:

- 1) Using the same gravity-based designations for the violations as were used in Matrix 1, locate the corresponding cell in Matrix 2. If the potential for harm of the initial violation (e.g., venting 20 pounds of HCFC-22) is significantly different than the subsequent violations (e.g., venting 20 pounds of CFC-12), Regions may use a different potential for harm cell in Matrix 2 than the one used in Matrix 1.
- 2) Multiply the dollar amount selected from the appropriate cell in Matrix 2 by the number of violations (e.g., number of additional appliances serviced).

Matrix 2:

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM

Major
Moderate
Minor

Major
\$3,000
\$2,500
\$2,000

Moderate
\$1,800

\$1,200
\$800

Minor
\$600
\$300
\$100

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g., notice of violation, warning letter, or administrative or judicial order), Regions should also assess an aggravated amount from Matrix 2 (i.e., increased by the same percentage as Matrix 1). The aggravated amount should be multiplied by the number of repeat violations of the same requirement. If the Region believes that this penalty amount is insufficient for deterrent effect, it may apply Matrix 1 to all repeat violations.

3. Size of violator

EPA will scale the penalty to the size of the Violator (calculate only once per violator) Size of violator is determined from an individual's or company's net worth. In the case of a company with more than one facility, the size of the violator figure is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations only the size of the entity sued should be considered. If the Region is unable to determine net worth, it may determine size of violator based on gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used. The gravity component will be scaled for size of violator using a multiplier. If a business has a net worth of \$300,000 (or gross revenues of \$1,000,000), the appropriate amount from the matrix (or matrices above should be multiplied by 1. For businesses with net worth of less than or more than \$300,000 (or gross revenues of less than or more than \$1,000,000), Regions should divide the net worth by \$300,000 (or the gross revenues by \$1,000,000) to determine the multiplier. Generally, the size of violator component should not be more than 50% of the penalty (i.e., no multiplier greater than 2 would be

used). The penalty for environmental harm/importance to the regulatory scheme multiplied by the size of violator factor, becomes the adjusted gravity component. If EPA is unable to obtain information about either net worth or gross revenues, than the Region should use an aggressive assumption for the size of violator, and adjust it downward if proof of a lower number is presented during negotiations.

Mitigating Penalty Amounts

The penalty amount calculated in accordance with this policy represents the minimum penalty that EPA can accept in settlement of cases of this nature, unless reductions from this amount are made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19 (dated October 25, 1991). In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In, administrative enforcement actions Regional Administrators or their designees must submit penalty justification documentation within 20 days of issuance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Grady's Heating and Air-conditioning Service services home and office air conditioning, systems. Hotel A, located in Miami, Florida, is having problems with its air conditioning system. It does not seem to be cooling properly. In October 1993, Hotel hires Grady's to fix the system. One of Hotel A's employees, Grace, notices that the service person is not carrying recovery or recycling equipment. She follows him to where the chiller is located. The unit contains 230 kilograms of CFC-12. She observes

him vent the entire charge from the system. Grace reports her observation to EPA. An inspection by EPA of Grady's facility reveals that the company owns recovery equipment and has apparently properly serviced all other appliances using the equipment. Grady's net worth is \$330,000.

Economic Benefit Component

The economic benefit of not using
the equipment for this job and
avoided labor cost
(less than \$500)\$0

Gravity Component

Knowing venting\$15,000
(from major-major cell)

Analysis: The violator's actions resulted in Major potential for harm because there was an actual less of a substantial amount of CFC-12, which is relatively more ozone depleting than HCFCs, and because a knowing release is prohibited during servicing unless it is de minimis. The violator's actions were a Major deviation from the requirement that persons not knowingly release refrigerant.

Size of violator (Business' net worth
is approximately \$330,000)
 $(330,000/300,000 = * 1.1$
\$16,500

Preliminary deterrence amount

Economic Benefit Component0
Gravity Component+16,500

Minimum penalty settlement amount\$16,500

One year later, the Agency receives a tip that Grady's has hired a new certified technician who is not always using recovery equipment when it is needed. After investigating the tip, the Agency concludes that on three occasions, Grady's has violated the venting prohibition.

Economic Benefit Component

The economic benefit of not using
the equipment for this job and
avoided labor cost
(less than \$500)\$0

Gravity Component

Knowing venting\$15,000
(from major-major cell)
aggravated by 30% (15,000 *.30)
because violation occurred after
an enforcement response+ 4,500
19,500
19,500

Analysis: The violator's actions resulted in Major potential for
harm because there was an actual loss of a substantial
amount of CFC-2, which is relatively more ozone
depleting than HCFCs, and because a knowing release is
prohibited during servicing unless it is de minimis.
The violator's actions were a Major deviation from the
requirement because the company did not comply at all
with the requirement that persons not knowingly release
refrigerant.

Multi-incident assessment
(# of additional violations multiplied
by major-major cell amount)
2 *\$30006,000
aggravated by 30% (6,000 *.30)
because violations occurred after
an enforcement response+1,800
7,800

+ 7,800

27,300

Size of violator (Business' net worth
is approximately \$330,000)
(330,000/300,000 =* 1.1
\$30,030

Preliminary deterrence amount

Economic Benefit Component 0

Gravity Component +30.030

Minimum penalty settlement amount \$30,030

Example 2

Joe, owner of Joe's Repair, has been manufacturing refrigerant recovery devices for small appliances in his spare time. Joe has not had the devices tested or certified by an approved equipment testing organization. Since November 15, 1993, Joe has manufactured seven units and is using them at his shop. When EPA tested the units, it determined that the equipment could recover 50% of the refrigerant in a small appliance. Joe's net worth is \$180,000.

Economic Benefit Component

The economic benefit of delaying
the cost of testing + cost of building
equipment that meets standards or
purchasing approved equipment \$ amount
from BEN

Gravity Component

Manufacturing uncertified equipment \$7,000
(from moderate-moderate cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (the equipment can only recover 50%) and because his equipment does not meet the minimum standard for recovery. The violator's actions involve a Moderate deviation from the requirements because although Joe is using some equipment, i.e., he is not simply venting, he did not have his equipment tested and certified.

Multi-incident assessment

(# of additional violations multiplied
by moderate-moderate cell amount)

$6 * \$1200 = \$7,200$

\$14,200

Size of violator (Business' net worth
is approximately \$180,000)

$180,000/300,000 \times .6$

\$ 8,520

Preliminary deterrence amount

Economic Benefit Component??

Gravity Component+ 8,520

Minimum penalty settlement amount\$

Example 3

Dave, a building manager for an office complex in Tacoma, Washington, uses passive recovery equipment when he or his crew (two people) work on the rooftop chiller that contains 30 pounds of R-22. Dave decided not to purchase the appropriate (and more expensive) recovery equipment for the building or get himself or his crew trained and certified. During a routine inspection in January 1994, an EPA inspector discovers that the building does not have the required recovery equipment, nor did Dave or the building owner ever submit a certification indicating that certified equipment had been acquired. The inspector also reviews the building's repair log which shows 5 repairs when the passive equipment was used. The building owner's net worth is \$1,500,000.

Economic Benefit Component

The economic benefit of delaying
the purchase of equipment + cost
of operation and maintenance + \$ amount
cost of certifying technicians from BEN

Gravity Component

Servicing without using
certified equipment \$7,000
(from moderate-moderate cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (passive equipment can only recover a small percentage of the actual charge) and because Dave is not using equipment that is

appropriate for the appliance serviced. The violator's actions involve a Moderate deviation from the requirements because although Dave is using some equipment, i.e., he is not simply venting, he is not using the equipment required by the regulations for this type of appliance.

Multi-incident

(# of additional violations multiplied
by major-moderate cell amount)4,800
(4 * \$1200)
9,000

Technicians not certified
(from moderate-major cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because the risk of loss due to untrained technicians improperly using recovery equipment is significant. The violator's actions involve a Major deviation from the requirements because the technicians did not comply with any of the technician certification requirements.

Multi-incident

(# of additional violations multiplied
by moderate-moderate cell amount)2,400
(2 * \$1200)

Failure to submit certification3,000
(from minor-major cell)

Analysis: The violator's actions resulted in a Minor potential for environmental harm because failure of an owner to certify undermines the Agency's ability to determine compliance with the regulations. The violator's actions involve a Major deviation from the requirements because the owner did not comply with any of the certification requirements.

Size of violator (Business; net worth26,200
is approximately \$1,500,000)
(1,500,000/300,000 = 5)

Because generally the size of violator
should be no more than 50% of the
preliminary deterrence amount, the
multiplier is reduced to 2)* 2
\$52,400

Preliminary deterrence amount

Economic Benefit Component ??
Gravity Component+52,400

Minimum penalty settlement amount \$